**MODEL ANSWER - QUESTION I - JULY 2007**

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) will not be answered here.

**MODEL ANSWER - QUESTION II - JULY 2007**

PLEASE NOTE: QUESTION II was a "Multistate Performance Test" (MPT) will not be answered here.

**MODEL ANSWER - QUESTION III - JULY 2007**

1) What factors should the court consider in determining an award of parental rights and responsibilities? Based on those factors, what should the court conclude?

The Court cannot order shared parental rights unless the parties agree. 15 V.S.A. Section 665(a) provides, "When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent." As the facts indicate that Annie intends to seek sole parental rights at the final hearing, the court will need to award sole physical rights and responsibilities to either Annie or Ben.

In awarding parental rights, the Court must be guided by the best interests of the child. 15 V.S.A. Section 665(b) requires that the court consider nine factors in making a best interests determination. These factors include:

(1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection and guidance;

(2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs and a safe environment;

(3) the ability and disposition of each parent to meet the child's present and future developmental needs;

(4) the quality of the child's adjustment to the child's present housing, school and community and the potential effect of any change;

(5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;

(6) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;

(7) the relationship of the child with any other person who may significantly affect the child;

(8) the ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided; and

(9) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.

The facts weigh in favor of sole parental rights and responsibilities being awarded to Annie. While both parents appear to have a good relationship with Cassie and both appear able to provide her with love, affection and guidance an also to provide for her material needs, Annie appears better suited to deal with Cassie's developmental needs. She has been Cassie's primary care provider and also her educator since the parties' separated. Moreover, it appears that Cassie has been having difficulty adjusting to Ben's new circumstances. Although there is no reason to believe that Ben is not being a supportive and capable primary care provider for his daughter when he has her, the facts strongly suggest that Cassie has developed a closer bond with her mother at this time and that Annie is better situated to take care of Cassie at this stage of her life.

Cassie has been living in the same place since birth and if Ben were to obtain sole custody, Cassie would have to move. Given her difficulty adjusting to Ben's new home, it does nt seem that moving her there full time would be in her best interest. It appears that both parties will be able to foster Cassie's relationship with the other parent. Although Annie is seeking sole responsibility, this does not appear to be an attempt on her part to alienate Cassie from her father. Rather, Annie appears to have legitimate concerns about Cassie's adjustment to Ben's new living situation. The fact that Annie has been Cassie's primary care provider weighs heavily in Annie's favor.

Cassie's relationship with Ben's girlfriend may be a factor. The facts do nto say the relationship is necessarily a problem, but that Cassie is having trouble adjusting. The court will need to take a closer look at this relationship to determine the weight of this factor.

The court need to consider the parties' ability to cooperate as they are not agreeing to share parental rights. Finally, there is no evidence of abuse. All of these factors weigh in favor of the court awarding sole parental rights to Annie. Ben, of course, will still be entitled to parent-child contact with Cassie on such schedule and under such circumstances as the court finds to be in Cassie's best interest.

2) Is the $300,000 inheritance part of the marital estate? Discuss.

In Vermont, all property owned by either party, however and whenever acquired, is considered marital property. 15 V.S.A. § 751(a). By this standard, Annie's $300,000 inheritance is part of the marital estate and should be considered by the court in its property award.

3) What factors should the court consider in making a property award? Analyze those factors as applied to Annie and Ben's circumstances.

In making a property award the court must equitably divide all of the property and may consider all relevant factors including, but not limited to:

(1) the length of the marriage;

(2) the age and health of the parties;

(3) the occupation, source and amount of income of each of the parties;

(4) vocational skills and employability;

(5) the contribution by one spouse to the education, training, or increased earning power of the other;

(6) the value of all property interests, liabilities, and needs of each party;

(7) whether the property settlement is in lieu of or in addition to maintenance;

(8) the opportunity of each for future acquisition of capital assets and income;

(9) the desirability of awarding the family home or the right to live there for reasonable periods to the spouse having custody of the children;

(10) the party through whom the property was acquired;

(11) the contribution of each spouse in the acquisition, preservation, and depreciation or appreciation in value of the respective estates, including the nonmonetary contribution of a spouse as a homemaker; and

(12) the respective merits of the parties.

The facts suggest a number of factors that would result in a favorable property award for Annie. First, although this is not a long marriage by Vermont standards, at 10 years, it is not a short marriage either. The length of this marriage dictates in favor of dividing the property fairly equally without regard to previous ownership. The facts do not address the parties' age and health, but they are presumably fairly young and healthy.

In terms of occupation and income, Ben is the only wage earner at this time and he earns a very high salary. Annie has not been employed outside the home since 2002. Ben obviously has significant skills in that he has been able to build a successful software company. Annie has great potential with her master's degree in de3velopmental psychology, but she is likely to need to update her education and training to get back in the work force. At this time she is not working as she is homeschooling Cassie. Assuming she and Ben agree to continue this arrangement, Annie will not have any income other than what she receives from Ben and what, if anything, she is able to earn as investment income. Even if Annie does return to work, she is unlikely to approach Ben's earning level.

The facts do not indicate that either party assisted the other in obtaining education. However,

Annie's willingness to stay at home allowed Ben to spend the necessary time and effort to establish his successful software company. In this way, she has certainly contributed to Ben's increased earning power.

The marital property consists of the parties' home, Ben's 401k, Ben's business, Annie's inheritance and any other assets either of the parties owns, together or separately. The facts do not say whether there is any debt. Presumably there is a mortgage on the home and perhaps other de3bt. The parties' needs will also be a factor.

Ben may be obligated to pay Annie spousal maintenance as she may be unable to provide for her own reasonable needs without his help. Annie's property award will depend in part on whether Ben is ordered to pay her any spousal maintenance.

Ben is likely to acquire future capital assets and income from his software business. Annie is not likely to acquire anything in the future unless she returns to work.

The court will be inclined to award the family home, or at least the right to live there, to Annie so that Cassie can remain in a familiar setting. This is particularly true in light of Cassie's developmental difficulties and her trouble in adjusting to Ben's new situation.

It appears that most of the property was acquired jointly, with the exception of Annie's inheritance. While the home and 401k were likely financed largely from Ben's earnings, Annie contributed by her efforts as homemaker and primary care giver for Cassie. This factor is not likely to have much effect on the property division although the court may regard the inheritance as more attributable to Annie as it was left to her personally.

The court is likely to regard Annie and Ben as equally responsible for the value of the marital estate. Annie's contribution has been primarily as homemaker, although she may have worked before Cassie was born. Annie has also contributed her recent inheritance. Ben's contribution has been primarily from his earnings.

Nothing in the facts indicates that "the respective merits" or "fault" will be an issue in property division.

In light of all the above, the court will attempt an equitable division of all the property and debt. The division may be slightly in Annie's favor as she will not have earnings. However, if Ben is ordered to pay her spousal maintenance, this could result in a more or less even property division.

4) Did the conduct of Annie's attorney raise any ethical considerations? Discuss.

Annie's attorney may have violated the rule against conflict of interest by agreeing to represent Annie. Rule 1.7 of the Rules of Professional Conduct prohibits a lawyer from representing a client if the representation of the client will be directly adverse to another client. It is not clear

from the facts whether Ben is still a client of the firm. If he is, Rule 1.7 clearly prohibits Annie's attorney from representing Annie.

With limited exceptions, Rule 1.9 prohibits a lawyer from using information relating to the representation of a former client to the disadvantage of that former client. While Annie's lawyer does not appear to have been involved in the firm's representation of Ben for his business dealings, Rule 1.10 prohibits a lawyer in a firm from knowingly representing a client when any one of them practicing alone would be prohibited from doing so under Rules 1.7 or 1.9. While a waiver from both clients might technically cure this defect, given that Annie's lawyer seems intent on using information to Ben's disadvantage, it would be difficult to obtain such a waiver. For all practical purposes, therefore, it appears that Annie's lawyer has a conflict of interest and cannot represent Annie.

Finally, Annie's attorney violated Rule 4.5 by threatening to reveal Ben's improper accounting practices in order to obtain an advantage in the divorce. Rule 4.5 provides that a lawyer shall not present, participate in presenting, or threaten to present criminal charges in order to obtain an advantage in a civil matter. It does not make a difference that the threat did not work.

**MODEL ANSWER - QUESTION IV - JULY 2007**

1. Discuss whether Hoggie-Doggie can enforce the covenant not to compete against Peter?

Covenants not to compete will be enforced in Vermont unless the agreement is found to be against public policy, unnecessary for the protection of the employer, or unnecessarily restrictive of the rights of the employee with due regard for the subject matter of the contract. See Fine Foods, Inc. v. Dahlin, 147 Vt. 599 (1986). A covenant not to compete will be found enforceable if it is reasonable as to time and scope. See A.N. Derringer v. Strough, 103 F.3d 243 (2d. Cir. 1996). Here, the covenant applies only for a period of two years, only within the town in which the employer has its principal factory, and only as to direct competitors of the employer. The Vermont Supreme Court has found enforceable a covenant not to compete for five years within a specific county. Vermont Elec. Supply Co., Inc. v. Andrus, 132 Vt. 195 (1974). The covenant not to compete signed by Peter is not against public policy as it tries to protect the interest of the employer for protection of its trade secrets in the utilization of this unusual machinery. See Systems and software, Inc. v. Barnes, 178 Vt. 389 (2005). The covenant does not unnecessarily restrict Peter's employment opportunities. He is a mechanical engineer in his first post-college job. There exists no evidence that he will be unable to find alternative employment. Indeed, his current employment with Ben and Joe's shows his ability to be gainfully employed by others. In light of the covenant's limited scope, the necessity of the covenant to protect Hoggie-Doggies legitimate trade secrets, and the likely ability of Peter to find alternative employment, the covenant will likely be found enforceable even though Hoggie Doggie terminated Peter for no apparent reason.

2. What types of remedies may be available to Hoggie-Doggie if they are able to enforce the covenant not to compete against Peter? Discuss each potential remedy, including the likelihood of a court awarding it to Hoggie-Doggie.

The contract provides for a $1,000 per day in liquidated damages. For a liquidated damages clause to be enforceable three criteria must be satisfied: (1) the nature of the subject matter of the underlying agreement must render actual damages difficult to ascertain (2) the sum fixed as liquidated damages must reflect a reasonable estimate of likely damages; and (3) the provision must be intended to compensate the nonbreaching party and not as a penalty for breach or as an incentive to perform. See Renaudette v. Barrett Trucking Co. , Inc., 167 Vt. 634 (1998). Here while the liquidated damage clause satisfies the first criteria, (as it will be difficult to determine the actual damages suffered by Hoggie-Doggie by Peter's work for Ben and Joe's) it is unlikely to satisfy either of the other two criteria given its size in relationship to the funds paid to Peter and the gross receipts of Hoggie-Doggie. Therefore, a court is likely to deem the clause to be an unenforceable penalty provision.

In addition, if the liquidated damages clause is unenforceable, then common law contract remedies would be available by Hoggie-Doggie against Peter by virtue of the severability clause contained in the agreement. See Four Oaks Conservation Trust v. Bianco, 2006 VT 6 (2006). Hoggie-Doggie may also seek an injunction stopping Peter from working at Ben and Joe's. Hoggie-Doggie would have to show that it will suffer irreparable harm form Peter's continued employment at Ben and Joe's, and that money damages are not adequate compensation. A court is likely to grant such injunction, given the risk of irreparable harm from disclosure of trade secrets and the difficulty in ascertaining money damages. See Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc., 148 Vt. 1 (1987).

Peter could raise equitable defenses to this proposed injunction. Peter's equitable defenses would be based upon the fact that he was terminated after only a very short period of time and equity demands fairness in his treatment in this matter, especially since he has not been paid any salary for his work at Hoggie-Doggie. However, if there were no fraud or other unfair behavior on behalf of Hoggie-Doggie, then the injunction would likely be enforceable at the discretion of the trial judge.

An alterative remedy available to Hoggie-Doggie would be actual compensatory damages. These may be difficult to prove given the limited time of Peter's employment with Hoggie-Doggie and the general difficulty in proving lost profits when an employee moves from one employer to another. However, if Hoggie-Doggie can prove these damages by a preponderance of the evidence, they can seek such damages. The measure of these damages would be so as to fulfill Hoggie-Doggie's expectation interest in this matter, plus reasonably foreseeable consequential damages, less any expenses saved by Hoggie-Doggie by Peter's breach of the covenant.

While punitive damages for breach of contract is available in Vermont, the breaching party's conduct must essentially be the equivalent to tortious conduct sufficient to support punitive damages. Given the actions of the parties herein, it is unlikely such damages would be available here.

3. Discuss whether Peter can enforce Hoggie-Doggie's promise of employment.

Peter is unlikely to enforce this agreement against Hoggie-Doggie pursuant to contract law, as the agreement is unenforceable pursuant to the statute of frauds. Contracts which contemplate performance more than one year from the date of execution must be in writing to be enforceable. 12 V.S.A. § 181. The fact that Hoggie-Doggie's president made only an oral promise of employment and has not executed any written agreement in any manner makes the oral promise of employment for a period of two years unenforceable against Hoggie-Doggie even though the covenant not to compete may be enforceable against Peter. See Couture v. Lowery, 122 Vt. 239 (1961). Partial performance of the contract by Peter does not render the entire oral promise of employment enforceable. See Squire v. Whipple, 1 Vt. 69 (1826).

4. What types of remedies may be available to Peter for his work at Hoggie Doggie, now and for the remainder of the two years of his employment with Hoggie-Doggie? Discuss each potential remedy, including the likelihood of a court awarding it to Peter.

Peter is entitled to receive payment for his work actually performed. That portion of Peter's salary he had earned prior to his termination would be payable as part performance under the contract and would not be foreclosed by the statute of frauds. However, Hoggie-Doggie's promise to employ and pay him for the remainder of the two year period is not enforceable. 12 V.S.A. § 181.

In the alternative, Peter could argue quantum meruit for the fair value of his work which benefited Hoggie-Doggie or promissory estoppel for any damages he sustained in changing his position in justifiable reliance of Hoggie-Doggie's unenforceable promise to employ him for a period of one year. (ie lost opportunity to work for another employer?) See Bassler v. Bassler, 156 Vt. 353 (1991).

Also, pursuant to statute, Peter is entitled to his wages for the time he has actually worked to be paid to him within 72 hours of his discharge. 21 V.S.A. § 342(c)(2). If, after investigation, the Commissioner of the Department of Labor finds that such payment was willfully withheld, then Hoggie-Doggie would be liable for double damages and other penalties. 21 V.S.A. §§ 342(a), 345.

**MODEL ANSWER - QUESTION V - JULY 2007**

1. Discuss and analyze the validity and effect of the document prepared by Paul.

The will prepared by Paul satisfies the technical requisites for a valid will. Vermont law requires that a will be signed by the testator in the presence of three others who must each sign the will as witnesses. 14 V.S.A. § 5. These requirements also apply to the revocation of wills; Joe's handwritten revocation of the will prepared by Paul would be ineffective.

The Vermont Supreme Court reviewed the standards for claims of undue influence in the case of *Eckstein v. Estate of Dunn*, 174 Vt. 507 (2002). The Court reviewed the doctrine of "suspicious

circumstances," which transfers the burden of proving the absence of undue influence to the beneficiary in an action to test the validity of the will. The Court observed:

Courts must enforce the testator's intent as expressed in a valid will; however, a will that is shown to be the product of undue influence should not be enforced. *In re Estate of Raedel*, 152 Vt. 478, 481, 568 A.2d 331, 332 (1989). A will is the product of undue influence "when a testator's free will is destroyed and, as a result, the testator does something contrary to his 'true' desires." *In re Estate of Rotax*, 139 Vt. 390, 392, 429 A.2d 1304, 1305 (1981).

Generally, the party contesting a will has the burden of proving undue influence. *See In re Will of Collins*, 114 Vt. 523, 533, 49 A.2d 111, 117 (1946). However, the burden shifts to the proponent of the will "when the circumstances connected with the execution of the will are such as the law regards with suspicion." *Id.* Suspicious circumstances can be found when there is a fiduciary relationship between the testator and the beneficiary. *Raedel*, 152 Vt. at 483, 568 A.2d at 334. Suspicious circumstances may also be present "where a relationship of trust and confidence obtains between the testator and the beneficiary, or where the latter has gained an influence or ascendency over the former." *Collins*, 114 Vt. at 533, 49 A.2d at 117. If such a scenario arises, "the will is presumed to be the product of undue influence, and it will not be enforced unless the proponent persuades the trier of fact that no undue influence attended the execution of the will." *Raedel*, 152 Vt. at 481-82, 568 A.2d at 333.

This Court has found certain exceptions to that presumption. We chose not to apply the presumption where the beneficiaries were children or grandchildren. *See Rotax*, 139 Vt. at 393, 429 A.2d at 1306. We subsequently extended the exception to the presumption to include nephews and nieces where the beneficiaries did not assist in preparing the will. *See Raedel*, 152 Vt. at 484, 568 A.2d at 334.

The application of these standards would likely result in a court finding that there were suspicious circumstances that shift the burden of proving the validity of the will to Paul, and that Paul will be unable to meet this burden. The court is likely to find that Paul exerted undue influence on Joe, and that the will prepared by Paul should not be enforced.

2. Discuss and analyze the validity and effect of the document prepared by Joe.

The document prepared by Joe does not meet the requirements of Vermont law to be a valid will. While three witnesses have signed the will, they did not sign in the presence of each other and the testator, which is the requirement of the statute. 14 V.S.A. § 5. Vermont recognizes holographic wills, but handwritten wills must be executed with the same formalities as typed or printed wills to be valid. Joe's oral direction to the nurse is also inadequate to create a valid will. Vermont recognizes nuncupative (i.e., oral) wills only for small estates of less than $200, or for some bequests of military personnel. *In re Estate of Cote*, 176 Vt. 293 (2004).

However, the document created by Joe may be a valid intervivos gift. The elements necessary to establish an inter vivos gift are: 1) a manifest intention to create a present interest in the donee during the joint lives of the donor and donee; 2) an unconditional delivery or divestiture of the

thing transferred; and 3) acceptance by the donee. Acceptance is presumed if the first two elements are established. *Tucker v. Colburn,* 140 Vt. 186, 189 (1981).

Joe unequivocally stated that he wished to give his non real estate property to Bob. Although Joe did not deliver the instrument to Bob, he parted with control of it, and the Nurse delivered the instrument to Bob. Assuming that the instrument was sufficient to transfer control of the assets, the gift should be deemed completed as the donor parted with control of the instrument conveying ownership of the property. Joe did not attempt to convey his real estate with this document, and the document would have been ineffective to do so inasmuch as it does not satisfy the requisites of a valid deed to real estate.

3. Discuss and analyze the court procedure for determining the disposition of Joe's property.

Vermont law vests jurisdiction over wills and estates in the probate courts. The probate court would need to determine what assets are in the probate estate, and this would be done, initially, by the executor or administrator appointed by the estate. Bob or Paul could contest the inventory of the estate, and the probate court would necessarily decide whether the property was gifted by Joe before his death, or whether it remained in his estate at death.

A proceeding to prove the validity of the will prepared by Paul would also take place in the probate court in the county in which Joe resided. The probate court would then enter orders allowing or disallowing the will. Any party interested in Joe's estate could contest a probate court decision allowing or disallowing the will in superior court, and then through an appeal to the Vermont Supreme Court. 14 V.S.A. §117; *Eckstein v. Estate of Dunn, supra.*

4. Discuss and analyze the possible dispositions of Joe's property.

Because the will prepared by Paul should be invalid because of Paul's undue influence, Joe's estate will be administered as an intestate estate. The estate will likely consist of Joe's real estate holdings only. His stock, bonds, and bank accounts will be deemed to have been given to Bob before Joe's death, assuming that the instrument was sufficient to transfer those assets, and not in Joe's probate estate at the time of death. However, his real estate was not included in the gift. Under Vermont law, the real estate would likely be distributed to Tom if he is alive. If Tom is not alive, the real estate would be divided between Paul and Bob. 14 V.S.A. § 551.

**MODEL ANSWER - QUESTION VI - JULY 2007**

1. Is the Heritage Society entitled to a copy of the memorandum? Discuss.

The Society is not entitled to a copy of the memorandum, unless the City Council voluntarily chooses to make it available for public inspection and copying.

Under Vermont's Public Records Act, 1 V.S.A., Chapter 5, Subchapter 3, a person may generally inspect or copy any public record or document of a public agency during regular business hours. A "public record" includes "all papers, documents, machine readable materials, or any other written or recorded matters . . . that are produced or acquired in the course of agency

business." 1 V.S.A. §317(a). A "public agency" is broadly defined as "any agency, board, department, commission, committee, branch, instrumentality or authority of the state . . . or authority of any political subdivision of the state." Id. at §317(b). The statute specifically exempts from public inspection and copying certain categories of public records, however.

In this case, the memorandum at issue qualifies as a "public record" under §317 since it is a document produced or acquired in the course of City business. The City Council qualifies as a "public agency" since the City is a political subdivision of the State that acts through the Council. Therefore, absent a specific exemption, the record should be available for public inspection and copying. Under §317(c)(17), however, "records of interdepartmental and intradepartmental communications in any . . . political subdivision of the state" are exempt from public inspection and copying "to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action . . . ." Here, the fact pattern states that the memorandum contains interdepartmental communications between the City planner and the City manager and discusses matters that are not primarily factual in nature (i.e., "the pros and cons of entering into the purchase option"). The matters discussed in the memorandum are preliminary to a determination of policy or action by the Council. Therefore, the memorandum, while a public record, qualifies for exemption from public inspection and copying under the Act.

Further, under §317(c)(13), "information pertaining to the location of real or personal property for public agency purposes prior to public announcement of the project and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts" is exempt from public inspection and copying. The fact pattern states that the City planner's memorandum discusses the "pros and cons" of entering into the purchase option. It is not entirely clear whether the memorandum includes discussion of either the location of the property or the appraised value or proposed purchase price of the property. To the extent that the memorandum contains such information, however, it is exempt from public disclosure.

2. Does the "coffee break" discussion create any concerns? Discuss.

Under Vermont's Open Meeting Law, 1 V.S.A., Chapter 5, Subchapter 2, all meetings of a public body are declared to be open to the public at all times unless a specific exception applies. A meeting is defined as "a gathering of a quorum of the members of a public body for the purpose of discussing the business of the pubic body or for the purpose of taking action." A public body includes "any board, council or commission of the state or one or more of its political subdivisions."

A municipal public body may hold an executive session from which the public is excluded only upon affirmative vote of a majority of its members. 1 V.S.A. §313(a). The motion to go into executive session must indicate the nature of the business to be considered in the executive session. Id. The vote to enter into executive session must be taken in the course of an open meeting and the result of the vote recorded. Id. No formal or binding action may be taken in executive session *except action related to the securing of real estate purchase options.* Id. A public body may hold an executive session only to consider one or more of the matters/issues listed in subsections (1)-(9) of §31(a). Subsection (2) lists "the negotiating or

securing of real estate purchase options" as one of the permissible topics for consideration during an executive session.

The "coffee break" discussion creates concerns, and probably violated the provisions of the Opening Meeting Law because a quorum of the Council, six members, gathered to discuss the business of the City without following any of the procedures for the conduct of an executive session. The council clearly qualifies as a "public body" under the statute, and could not properly exclude the public from its meeting without a vote to enter executive session, specifying the nature of the business to be considered.

Ironically, if the Council had voted to enter executive session to discuss the purchase option for the parking garage it could have lawfully done so and, further, could have approved the purchase option during the executive session (an exception to the general rule that no formal or binding action may be taken in executive session). Having failed to follow the procedures for executive sessions set forth in the statute, however, the Council's "coffee break meeting" was illegal.

3. Is the vote cast legal?

The vote is legal. Under the fact pattern, the Council voted 6-3, following a proper motion and second, to approve the purchase option during an open meeting. 1 V.S.A. §172 provides that "[w]hen joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise." Although the discussion that occurred during the coffee break was improper, the vote and action taken by the council was lawful because a majority of the entire Board voted to approve the option. There is no issue with regard to the participation of the vacationing member in the meeting and vote. The Open Meeting Law provides that "a meeting may be conducted by audio conference or other electronic means, as long as the provisions of this subchapter are met." 1 V.S.A. §312(a).

4. Assuming that there were statutory violations in the conduct of the meeting, what, if any, relief could the Benmont Heritage Society seek, and how would they go about doing so?

The statute, 1 V.S.A. §314, provides that the Attorney General or a person aggrieved by a violation of the provisions of this subchapter may apply to the superior court in the county in which the violation has taken place for appropriate injunctive relief or for a declaratory judgment. In this case, the Historical Society could apply to Madison Superior Court for an order prohibiting the Council from excluding the public from its meetings in the future without first following the procedures to enter executive session. There is little additional relief that the Court could award, however.

The Court does have authority to find those Council members who participated in the "coffee break meeting" guilty of a misdemeanor and to fine them not more than $500 if it concludes that they "knowingly and intentionally" violated the provisions of the Opening Meeting Law or "knowingly and intentionally" participated in the wrongful exclusion of any

person from a meeting. §314(a). In this case, however, the fact pattern does not indicate or suggest that the Council members intentionally violated the Open Meeting Law and, therefore, it is unlikely that they would be penalized under this provision.

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